

STATE OF MICHIGAN
COURT OF APPEALS

MAY SUTTON,

Plaintiff-Appellee,

v

KENNETH SUTTON,

Defendant-Appellant.

UNPUBLISHED

February 15, 2011

No. 293235

Livingston Circuit Court

LC No. 08-003892-DO

Before: MURPHY, C.J., and MURRAY and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right the judgment of divorce, complaining that an inequitable property division resulted. We affirm.

On appeal, defendant argues that multiple underlying factual findings made by the trial court were unsupported by the record. Defendant contends that the trial court erroneously found that plaintiff might be unable to work in the future due to poor health, that the trial court erroneously concluded that defendant, despite his earning abilities and contributions to the marital estate, should bear sole responsibility for bad marital investments and, indirectly, the balance on the equity line of credit, and that the trial court erred in placing an inordinate amount of weight on defendant's infidelity in dividing the marital property. Defendant argues that, as a result of these errors, which affected resolution of three of the property division factors, the trial court improperly divided the property in a manner that greatly favored plaintiff. Defendant maintains that the trial court's division of the marital property was inequitable. Defendant also appears to argue that the trial court did not make sufficiently detailed findings with respect to the property division factors.

"In divorce actions, findings of fact made in relation to the division of marital property are reviewed under the clearly erroneous standard." *Pickering v Pickering*, 268 Mich App 1, 7; 706 NW2d 835 (2005). A trial court's factual findings will not be reversed unless they are found to be clearly erroneous, meaning that, this Court is left with a definite and firm conviction that a mistake has been made. *Reed v Reed*, 265 Mich App 131, 150; 693 NW2d 825 (2005). "If this Court upholds the trial court's findings of fact, it must then decide whether the dispositional ruling was fair and equitable in light of those facts." *Id.* A trial court's dispositional ruling should be affirmed unless this Court is left with the firm conviction that the property division was inequitable. *Pickering*, 268 Mich App at 7.

In dividing the marital property, the trial court's opinion here addressed the property-division factors set forth in *Sparks v Sparks*, 440 Mich 141, 159-160; 485 NW2d 893 (1992). The *Sparks* Court stated:

We hold that the following factors are to be considered wherever they are relevant to the circumstances of the particular case: (1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity. There may even be additional factors that are relevant to a particular case. For example, the court may choose to consider the interruption of the personal career or education of either party. The determination of relevant factors will vary depending on the facts and circumstances of the case. [*Id.* (citation omitted).]

“The trial court’s factual findings are accorded substantial deference.” *Berger v Berger*, 277 Mich App 700, 717; 747 NW2d 336 (2008). In regard to findings by a court in a bench trial, “[b]rief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without overelaboration of detail or particularization of facts.” MCR 2.517(A)(2). With respect to reviewing a trial court’s factual findings for clear error, “regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.” MCR 2.613(C); see also *Thames v Thames*, 191 Mich App 299, 311; 477 NW2d 496 (1991) (we give special deference to a court’s findings that are based on witness credibility). Ultimately, “[t]he goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances.” *Berger*, 277 Mich App at 716-717.

Before launching into a discussion of the property division factors, we point out that the disparity in the property division was essentially created by the award to plaintiff of \$150,000 in alimony in gross,¹ given that the trial court otherwise evenly divided, for the most part, the marital estate. There is no equity, and indeed negative equity, in the marital residence awarded to plaintiff, where the appraised value of the home is surpassed by the mortgage and the balance on the home equity line of credit, which obligations plaintiff was ordered to pay. It appears from the record that the trial court ordered defendant to pay the alimony in gross so that plaintiff could use those funds to pay off the balance on the line of credit, which balance nearly equaled the amount of the alimony in gross. On the record presented at trial, and given all of the circumstances in this case, we find no inequity in the court’s decision.

With respect to factor 1, the trial court expressed that the parties had a long term marriage of 38 years. With respect to factor 2, the trial court found that plaintiff generally paid for the

¹ If alimony, now referred to as spousal support, is either a lump sum or a definite sum to be paid in installments, it is alimony in gross, which is not truly alimony intended for a spouse’s maintenance, but rather is in the nature of a division of property. *Staple v Staple*, 241 Mich App 562, 580; 616 NW2d 219 (2000).

household expenses and marital debts, while defendant was responsible for investing his earnings for the parties' future, but defendant made certain investments without the full knowledge and against the wishes of plaintiff. In the process, defendant obtained a line of credit and had run up a balance owing of nearly \$150,000. The trial court noted that defendant used \$50,000 for his condominium and furniture for the condo, and the court found that defendant failed to account for the remaining balance.² With respect to factor 3, the trial court noted that plaintiff was 57 years old and defendant was 58 years old at trial. With respect to factor 4, the trial court recognized that plaintiff was afflicted with psoriasis, which was in part causing her loss of hearing, and that defendant was in good health. With respect to factors 5 and 6, the trial court's nine-page opinion clearly touched on matters concerning the parties' necessities and circumstances and the life status of the parties. With respect to factor 7, the trial court found that plaintiff's ability to work could be impaired by her health problems, while defendant has the ability to work. With respect to factor 8, the court found that defendant engaged in an affair and misled plaintiff about its initial existence and later about his intentions to terminate it. The trial court further referenced an incident in which defendant was psychologically cruel to plaintiff, which led to her hospitalization. The trial court noted that defendant claimed to have less income in 2008, although he provided little documentation to substantiate this claim. The court found "unbelievable" defendant's assertion that he made less income because he had to spend time searching for documents demanded in the divorce proceedings. The trial court, therefore, found that defendant was concealing his income in that regard. The trial court also determined that defendant left plaintiff with marital debt, while his debts were paid. We find that the trial court's findings were sufficient and reject defendant's argument to the contrary.

On appeal, defendant takes exception to the trial court's findings regarding plaintiff's health and earning ability, defendant's earnings and contributions to the marriage, and defendant's fault.

First, defendant takes exception with the trial court's finding that plaintiff may be unable to work in the future due to her psoriasis. Below, there was testimony regarding plaintiff's health conditions and her age. Notably, plaintiff testified that she had psoriasis all over her body; significantly, she was losing her hearing due to psoriasis in her ears. There was no evidence to refute plaintiff's testimony regarding her health issues. Given plaintiff's age and health problems, we conclude that the trial court did not clearly err in finding that plaintiff's health problems may inhibit her future ability to work. The record in this case supports the trial court's factual findings regarding plaintiff's health and ability to work, and we are not left with a definite and firm conviction that a mistake was made.

Next, defendant challenges the trial court's finding that essentially assigned responsibility to him for failed investments and for the balance on the line of credit secured by the marital residence. Plaintiff testified that she opposed investing in GVC and found out that defendant

² At trial, there was testimony that \$50,000 had been invested in GVC (a long distance services provider) from equity line funds. GVC later went bankrupt.

invested in that venture after the fact. While defendant testified that plaintiff approved of that investment, we defer to the trial court's assessment of credibility, MCR 2.613(C). With respect to the line of credit, plaintiff testified that she had no information about the line of credit until discovery commenced in the instant case. The evidence demonstrates that \$7,193 was outstanding on the line of credit as of January 2006. Thereafter, defendant ran the balance up to nearly \$150,000, of which \$50,000 was spent on the failed GVC investment behind plaintiff's back and absent her approval and an additional \$50,000 was spent on a condominium and furniture. The trial court found that the condo was supposedly purchased for defendant's business, "but was really purchased as his home." The court stated that the condo, which was awarded to defendant, is owned "free and clear since [defendant] paid with the equity line of credit on the marital home." In finding that thousands of dollars relative to the line of credit was not accounted for, the trial court rejected defendant's representation of how the funds were used and concluded that he used the money for his own personal expenses. The court found "unbelievable" defendant's claims that he spent nothing on his mistress despite the two taking long-distance trips together, dining out on a regular basis, and engaging in the affair for four years. The court noted the testimony by defendant's mistress that defendant would at times cover their expenses. And we note the testimony by plaintiff that when she confronted defendant and asked him whether he paid towards a condo for his mistress, he refused to answer. Regarding the level of defendant's earnings, we find no clear error in the court's assessment that defendant was being deceptive as to his income given the lack of documentation and the evidence of a pattern of deception in general. Again, credibility issues are reserved for the trial court. We find no clear error in holding defendant accountable and responsible for the outstanding line of credit and failed investments.

Next, defendant complains that the trial court placed an inordinate amount of emphasis on his affair and ordered an inequitable property distribution to punish him. A circumstance "to be considered in the determination of property division is the fault or misconduct of a party." *Davey v Davey*, 106 Mich App 579, 581-582; 308 NW2d 468 (1981). However, "the trial court must consider all the relevant factors and not assign disproportionate weight to any one circumstance." *Sparks*, 440 Mich at 158.

The record generally supports the trial court's findings regarding defendant's extramarital relationship. Plaintiff testified at length about the affair and defendant's efforts to conceal and mislead plaintiff about the affair's existence. While defendant made some denials about when the affair began and the frequency of sexual encounters with his mistress, his mistress undermined some of that testimony. The trial court found defendant's affair to be significant in relationship to assessing defendant's credibility. It is undisputed that defendant lied to plaintiff about the existence of the affair, misled her about the termination of the affair, and participated in counseling with plaintiff while still engaging in the affair.

However, the trial court's findings were not limited only to the affair. In its opinion, the trial court noted an incident in which defendant was psychologically cruel to plaintiff, which led to her hospitalization. The trial court also noted in its opinion that defendant claimed to have less income in 2008, although he provided little documentation to substantiate this claim. The trial court, therefore, found that defendant was concealing his income in that regard. The trial court also found that defendant left plaintiff with marital debt, while his debts were paid, and that defendant used equity line funds for his own personal benefit. The intent of the trial court in

ordering the alimony in gross was to supply funds to plaintiff to pay off the balance on the line of credit, and it cannot be said that the trial court ordered defendant to pay the alimony in gross simply because of the affair. The court's decision was also predicated on the circumstances involving how the line of credit was used by defendant. Indeed, defendant kept plaintiff in the dark regarding use of the line of credit. Ultimately, there is no indication that the trial court gave disproportionate weight to defendant's affair in rendering its decision, but considered all of defendant's conduct towards plaintiff.

In sum, the trial court's challenged findings found support in the record and were based on credibility determinations with which we decline to interfere. We are not left with a definite or firm conviction that a mistake was made. As such, we affirm the challenged factual findings. We now address whether the trial court's dispositional ruling was fair and equitable in light of the facts.

In the judgment of divorce, the trial court, as indicated above, awarded the marital residence to plaintiff and ordered her to assume the mortgage payment, taxes, utilities, and any other encumbrances, including the line of credit. The trial court ordered defendant to pay alimony in gross in the amount of \$150,000 plus interest to plaintiff. The trial court awarded the condominium to defendant subject to a lien by plaintiff until the award of alimony in gross is paid in full. The trial court also awarded plaintiff the parties' cottage. The trial court divided equally the parties' pension, retirement, and investment accounts. The trial court awarded both parties certain items of personal property. Plaintiff was awarded "all furnishings, appliances, and personal items in the marital home, including but not limited to, the riding lawnmower, generator, snow thrower, lawn equipment, large screen TV with stand and CD player, glass table, foyer table, dining room set, kitchen set, washer/dryer, appliances, and the smaller tool chest with tools." The trial court ordered the grand piano, motorcycle, and boat to be sold, with one half of the net sale proceeds to be credited against defendant's alimony obligation and with plaintiff receiving the entire proceeds from any sales. The parties retained their respective vehicles.

Below, there was a great deal of testimony regarding the value of the various items of personal property. The record demonstrates that the aforementioned marital assets totaled \$562,883, which was the sum of the real property, investment accounts (including the Mashpee account), and the items of personal property. The marital debt equaled \$284,500, which was the sum of the marital residence's mortgage and the line of credit. Without considering the line of credit which debt was offset by the award of alimony in gross, the judgment provided plaintiff with \$267,916 in marital assets and defendant with \$149,666 in marital assets. The allocation of the line of credit and the award of alimony in gross served to balance the equities in this case, where defendant unilaterally obtained the line of credit and ran up more than \$140,000 in debt on that line of credit in the more than two years preceding the instant trial. There was a concern that defendant would simply ignore his obligation related to the line of credit, which could cause plaintiff to sell the marital residence at a significant loss or lose it in foreclosure. The property distribution ultimately favors plaintiff, but not to the extent argued by defendant on appeal.

In sum, the trial court sought to craft an equitable property division in this case in light of the circumstances. *Reed*, 265 Mich App at 152. The instant property division did not achieve mathematical equality; however, the trial court's opinion indicated that it sought to balance the

equities given plaintiff's tenuous hold on the marital residence that was caused by defendant's unilateral decisions to increase marital debt. See *Woodington v Shokoohi*, 288 Mich App 352; ___ NW2d ___ (2010) (when a party has dissipated marital assets absent the fault of the other spouse, the value of the dissipated assets can be included in the marital estate). On appeal, defendant attempts to manipulate the numbers to suggest that a 96-to-4 percent property division occurred. Defendant's accounting fails to acknowledge that plaintiff is responsible for all of the marital debt and that her ability to discharge some of that obligation depends on defendant's payment of the alimony in gross.

An unequal division of marital property is not contrary to Michigan law as long as it is based on appropriate criteria. *Washington v Washington*, 283 Mich App 667, 673; 770 NW2d 908 (2009). Here, the property division favored plaintiff; however, the trial court assessed the relevant factors, and the record supported such findings. Moreover, "there is no Michigan statute or caselaw that precludes outright a substantial deviation from numerical equality in a property distribution award." *Id.* In this case, the trial determined that the situation did not warrant a 50-50 property division based upon the property division factors. The trial court did not err in awarding plaintiff \$150,000 in alimony in gross. The trial court used its equitable powers to mold relief according to the nature of the case and it did what was necessary to accord complete equity and to conclude the controversy. *Cohen v Cohen*, 125 Mich App 206, 211; 335 NW2d 661 (1983). In sum, we conclude that reversal is not warranted with respect to the division of property in this case.

Affirmed.

/s/ William B. Murphy
/s/ Christopher M. Murray
/s/ Douglas B. Shapiro